RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

IN RE FENNERSTEIN'S CHAMPAGNE.

In order to show the actual market value of articles of merchandise at a particular place in a foreign country, letters by third parties abroad to other third parties—offering to sell at such rates—if written in ordinary course of the business of the party writing them, and contemporaneously with the transaction which is the subject of the suit, are admissible as evidence, even though neither the writers or the recipients of the letters are in any way connected with the subject of the suit, and though there is no proof that the writers of the letters are dead.

ON a libel of information and seizure in the District Court for the Northern District of California, the question was whether certain champagne wines made at Rheims, in France, and invoiced for this country in October 1863, had been knowingly invoiced below "the actual market value of them at the time and place when and where manufactured," at which actual value the statute requires that they should be valued. Upon the trial, as appeared by the bill of exceptions, the claimants introduced testimony tending to show that champagne wines in the hands of the manufacturers in the Champagne district of France, in a manufactured state, ready for consumption, have no fixed actual market value, and are not sold or dealt in at the place of production. To rebut this evidence and for the purpose of showing that such wines are held for sale at current rates and prices, at which they are freely offered and sold there, and also to show, among other things, the market value of the wines in question, the United States offered in evidence seven letters, dated on and between October 27th 1863 and May 12th 1864, from various persons, large dealers at Rheims, where, as already said, the wines were manufactured. One will exhibit the type of all:—

"Rheims, 29th of April 1864.

"Mr. AMOS HILL, of California, Edwards's Hotel, Hanover Square, London.

"I received the letter which you have done me the honor to write to me, under date of Liverpool, 26th instant, and I hasten to answer it. I sell only one single quality of champagne wine,

'Qualite Superieux' (Eugene Clicquot brand). The price of this wine is 4 francs the bottle, and f. 4.25 the two half-bottles, taken at Rheims, packing included; and I allow 3 per cent. discount for payment in cash. I know perfectly well the kind of wine which suit the American taste. My brand is also very highly appreciated in New York and California. I have put the price at the lowest that I can sell wine, in consideration of the importance of your orders, and in the hope of establishing permanent relations with your respectable house.

"Accept, Monsieur, my hearty salutations,

"EUGENE CLIQUOT."

To the introduction of all these letters the claimants' counsel objected, assigning the same grounds which were assigned against the introduction of certain prices current in the case of *Cliquot's Champagne*, 3 Wallace (not yet published), to wit: that they were immaterial and irrelevant, because they referred to champagne wines, different in kind, quality, and price from those proceeded against in this action; because no actual sale or purchase had been or was proposed to be proved, based upon or connected with the letters offered—assigning also as ground additional that these letters were *res inter alios acta*, and that the letters in reply to which they were written were not produced.

The court below (Mr. Justice OGDEN HOFFMAN) admitted the letters, and the government had judgment. On error here their admissibility was the point discussed.

D. B. Eaton, for the claimants.—The theory of the law of evidence, on which these letters were received, would seem to have been this: that when the question is, whether there is a market price for an article, and what the same is at a specific time and in a given city, in a foreign country, the facts relative thereto may be proved by reading in evidence whatever any manufacturer of the article referred to has written on the subject at any time, within about a year of the date in question, to anybody else in any part of the world; and that this may be done when all the letters, to which those read are responses, are withheld.

Independently of all the objections which in the case of *Cliquot's Champagne* were made to certain prices current there offered, and which apply as well to these letters, the objection of *res inter alios acta* has direct and the strongest bearing.

The Attorney-General, and *Lake*, District Attorney for California, contrâ.

Mr. Justice SWAYNE delivered the opinion of the court:

The only point of the several objections taken to the admission of the letters, necessary to be considered, is, that they were *res inter alios acta*, and hence incompetent. The others are disposed of by what was said in the case of *Cliquot's Champagne*.

In *Taylor et al.* v. *The United States*, 3 Howard 210, foreign invoices relating to goods other than those of the claimant, and received by other merchants, were admitted to rebut the evidence given by the claimant of a general usage to allow a deduction of 5 per cent. for measurement—those invoices showing no such allowance—and a foreign letter attached to one of the invoices, though objected to, was also received. This court approved the ruling of the court below. In the case of *Eugene Cliquot's Champagne*, just decided, we held that the answer of a dealer, and a price current, relative to the prices of his wines, given by him to a witness, were competent evidence.

In *Doe* d. *Patteshall* v. *Turford*, 3 Barn. & Adol. 890, it was held by the King's Bench that the entry by an attorney of the service on a tenant of a notice to quit, made in the ordinary course of his business, was admissible. In *Stapylton* v. *Clough*, 22 Eng. L. & Eq. 276, a like entry made by an attorney's clerk, contemporaneously with the service, was held to be admissible for the same reasons; but the after parol declaration of the clerk, offered to contradict the entry, was rejected. In this case Lord CAMPBELL said, "I entirely approve of the decision in *Doe* d. *Patteshall* v. *Turford*, and the cases decided upon the same principle. They lead to the admission of sincere evidence, and aid in the investigation of truth."

In *Carrol* v. *Tyler*, 2 Harr. & Gill 56; in *Sherman* v. *Crosby*, 11 Johns. 70; and in *Shearman* v. *Akens*, 4 Pick. 283, cases in Maryland, New York, and Massachusetts, the receipts of third persons for money paid to them by one of the parties to the suit were received in evidence without the presence of the persons by whom the receipts were given. In *Holladay, Executor of Littlepage*, v. *Littlepage*, 2 Munford 316, in the Supreme Court of Appeals of Virginia, the parol declaration by a third person of such payment was admitted. In *Alston* v. *Taylor*, 1 Haywood

395, in North Carolina, a receipt given by an attorney of another state for certain claims placed in his hands for collection was held to be admissible to show the time at which he received the claims. In *Prather* v. *Johnson*, 3 Harr. & Johns. 487, the Court of Appeals of Maryland said: "If A., as surety of B., pays a debt due to C., on proof of the payment A. could recover of B. He could recover on C.'s *saying* he had paid, and of course if C. *wrote* that A. had paid, surely it is evidence, whether the writing is *in a book* or *a letter*."

We think the letters in question in this case were properly admitted. In reaching this conclusion we do not go beyond the verge of the authorities to which we have referred. In some of those cases the person claimed to be necessary as a witness was dead. But that can make no difference in the result: 1 Greenl. on Evid., § 120; *Holladay* v. *Littlepage*, 2 Munford 321. The rule rests upon the consideration that the entry, other writing, or parol declaration of the author, was within his ordinary business. In most cases he must make the entry contemporaneously with the occurrence to which it relates: *Stapylton* v. *Clough*, 22 Eng. L. & Eq. 276. In all, he has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth. Safer sanctions rarely surround the testimony of a witness examined under oath. The rule is as firmly fixed as the more general rule to which it is an exception. Modern legislation has largely and wisely liberalized the law of evidence.

We feel no disposition to contract the just operation of the rule here under consideration.

Judgment affirmed.

Justices WAYNE, CLIFFORD, and DAVIS declared their inability to assent to so much of the preceding opinion as decides that the letters, written by third persons, and addressed to third persons, were properly admitted in evidence

The question considered and decided in the foregoing case, is whether the letters admitted in evidence came within that numerous class of cases embracing entries and declarations made in the usual course of business, and therefore admissible as evidence of the facts therein recorded. Some of the circumstances of the case, particularly the fact that the letters referred to passed between parties in no way connected with the litigants, coupled with the dissent of three judges upon that very ground, at first leave the impression that perhaps the court has exceeded the limits of the authorities on this subject; but it is believed that the

decision, except in the one particular of not requiring proof of the death of the persons writing the letters, may be well sustained by principle as well as authority.

All acts, declarations, &c., made by third persons are obnoxious to two objections. First. That they are *res inter alios acta*, and therefore irrelevant. Second. That they are mere hearsay, the assertions of parties without the sanction of an oath and an opportunity for cross-examination. But entries against interest, and in the course of business, have always been considered as limitations of the rule excluding the first, and they are admitted, not because the acts or admissions of third parties can ever bind others, but because they are evidence, just as the same parties' oath would be, of the facts therein stated. The peculiar circumstances under which they are made are considered quite as efficient a safeguard against falsehood as an oath, and when the opportunity for cross-examination is forever lost by the parties' death, such entries and declarations are freely admitted in evidence in suits between other parties.

The very origin and nature, then, of this kind of evidence presupposes that it was made by third persons, not parties to the suit nor necessarily connected with them, but which is admitted because the law considers it sufficiently worthy of credit for communication to the jury.

Now, the only difference perceived between the ordinary cases on this subject and the principal case is the fact that the entries or declarations here consisted of, or were contained in, *letters* written, not only *by* third persons, but *to* third persons, none of whom were connected in any way with the parties to the suit. We do not see why this should make them objectionable.

In the most numerous instances of these entries (in the course of business) in notaries', physicians', clerks', &c., books, they are made and completed by the single act of one person; and it is only in the case of letters or papers intended for communication and transmission to others that the supposed difficulty of the principal case is introduced. Unless letters and such papers are altogether excluded from the class of entries and declarations we are considering, it does not seem that the mere fact that they pass *between* third persons, instead of remaining in the custody of one, presents any reason for their exclusion. Such a circumstance should add to their credibility. Of course all such entries must relate to the subject-matter of the suit or some fact arising therein.

A great number of authorities exist on this subject, and, in perhaps all the states, such entries have been fully admitted. Whatever variance in the course of decision exists is to be found on the subject of a component point in the principal case, viz., the requirement of the death of the party making such entries before the same become evidence; and in the generality of the opinion upon this point the court is opposed by all the English and many American authorities.

It is well settled that in the class of cases embracing entries against interest the fact of the declarant's death must be shown before their admission, but it has been contended that a different rule applies to entries in the course of business, and that they are admissible without regard to the fact of death, and 1 Greenleaf's Evid. § 120, is cited in support of this idea. It certainly is not to be found anywhere else; for the authority relied upon, the opinion of a single judge (PARKE, in *Doe* v. *Turford*), is misapprehended. That judge, in distinguishing between the two kinds of entries, does not contrast them as to the fact of a person's death, but as to the *time* at which they must have been made (entries in the course of business only require to be contemporaneous with

the fact recorded). Moreover, in that case, the party who had made the entry was dead. In both classes the circumstances under which they were made are considered equal to an oath, but only in default thereof when it cannot be obtained. In neither case are they thereby made original evidence. They are exceptions to the rule excluding hearsay; but admitting them to be evidence at all immediately subjects them to another rule, discriminating between primary and secondary evidence and requiring the best evidence to be produced. While the declarant is living his own sworn declaration is certainly inferior to his examination under oath.

In all the cases, therefore, the fact or necessity of the party's death is recognised, or at least some account of him must be given, and no case has been found in which the entries were admitted irrespective of his death or whereabouts.

In *Chambers* v. *Bernasconi*, 1 Cr., M. & R. 347, Lord DENMAN, after stating the proposition in regard to such entries in terms in which the death of declarant was included, said, "All the terms of the legal proposition above are manifestly essential to render the certificate admissible." And the best text-writers agree hereon: 1 Starkie 66, 465; 1 Phillips 347 (4th Am. ed.); and 1 Smith's Lead. Cas. 394–5. Mr. Greenleaf himself, in another section, vol. 1, 115, says, "If the party be living and competent to testify, it is deemed necessary to produce him."

Many of the American cases have adhered to the strict requirement of precedent death, while some have relaxed the rule somewhat, and admitted entries, where the author was shown to be out of the state or beyond the reach of the process of the court, which they say is equivalent to death.

In New York, if the party be living, though out of the state, he must be called or examined on commission: *Brewster* v. *Doane*, 2 Hill 537. And in Alabama (*Moore* v. *Andrews*, 5 Porter 107) absence from the state is held not sufficient to admit entries upon proof of handwriting. The cases of *Kennedy* v. *Fairman*, 1 Hayw. 458, and *Whitfield* v. *Walk*, 2 Hayw. 24 (North Carolina), are to the same effect.

In Pennsylvania, absence from the state or jurisdiction of the court, so far as it affects the admissibility of secondary evidence, has the same effect as death: *Alter* v. *Berghaus*, 8 Wright 77; *Bank* v. *Whitehill*, 16 S. & R. 90. So in South Carolina (*Elms* v. *Chevis*, 2 McCord 349), and Maryland (15 Md. 523), where the clerk was out in Australia, and had not been heard from for a long time.

Some American cases have indeed extended the principle of the admission of this class of entries by admitting them during the parties' lifetime, when they are verified and authenticated by the oath of the party making them, though he cannot remember any thing about the facts therein stated: *Bank* v. *Boraef*, 1 R. 152; *Bank* v. *Culver*, 2 Hill 531; *Sassces* v. *Bank*, 4 Md. 418; and 1 Fla. 322. In such cases they are essentially the oath of the party, and present a very different case from mere proof of his handwriting.

Though the fact in the principal case that the party writing the letters was in a foreign country would seem to bring it within the more liberal American decisions, it will be seen that the general statement made therein, following Mr. Greenleaf, that all such entries are admissible, irrespective of death, is not borne out; for in those cases admitting them when witness is absent it is expressly upon the ground that absence is equivalent to death, and if he is present he at least must be called to verify them.

T. H.